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Supreme Court, U.S.
FILED

No. 081003 SEP 30 2008

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SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Respondent-Appellees

-against-

MARCO FIDEL CASTELLAR,

Petitioner-Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

PETITION FOR A WRIT OF CERTIORARI

Marco Fidel Castellar
In Propria Personam
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Flushing, NY 11355
(347) 720 3923

QUESTIONS PRESENTED

1. Whether Petitioner was denied his constitutional right to a fair trial, and due process of law, when the trial judge asked over 650 questions of the government witnesses during a three-day trial

2. Whether Petitioner was denied equal protection and due process of law when the appellate court granted petitioner the opportunity to file a F.R.A.P. Rule 40 application and then, over the objection of petitioner, permitted counsel to withdraw, and then refused to appoint another attorney for the purpose of perfecting said application.

PARTIES

The parties to this action are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Marco Fidel Castellar, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on September 25, 2007.

OPINIONS BELOW

The September 25, 2007, judgment rendered from the United States Court of Appeals for the Second Circuit, which is not officially reported, is set forth at Appendix I. The July 3, 2008, order of the United States Court of Appeals for the Second Circuit denying a motion for reconsideration to recall the mandate, which is not officially reported, is set forth at Appendix II.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 25, 2007. On October 25, 2007, counsel sought and was granted leave to withdraw, and petitioner was permitted to file a petition for rehearing on or before December 3, 2007. On November 14, 2007, petitioner sought an extension of time and to have another counsel appointed which was denied by the court on December 11, 2007. Petitioner, again, moved the court for the relief requested in the November 14, 2007, moving papers, which was denied by the court on December 27, 2007.

On January 22, 2008, petitioner moved to recall the mandate, which was denied by the court on February 13, 2008. On February 27, 2008, petitioner filed a motion for reconsideration to recall the mandate, which was denied by the court on July 3, 2008. The jurisdiction of this Court rests on 28 U.S.C §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions are grounded in the on Equal Protection and Due Process Clause to the United States Constitution, which guarantees due process, the right to a fair trial, and the assistance of counsel on appeal. The statutory provision underlying the issue presented is grounded in Rule §§40 of the Federal Rules of Appellate Procedure which in sets in relevant part that..."The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended"

STATEMENT OF THE CASE

Petitioner was convicted following a bench trial before the Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, petitioner was acquitted of thirty two (32) counts and convicted of five (5) counts of Making False Claims to the IRS, in violation of 18 U.S.C. §287, and one (1) count of Obstruction of Justice, in

violation of 18 U.S.C. §1512(c)(1). On March 21, 2005, petitioner was sentenced to 51 months imprisonment.

An appeal was taken to the United States Court of Appeals for the Second Circuit. Particularly illuminating is the fact that retained counsel, Alan Brenner, was relieved by the district court on March 21, 2005, in contravention to Second Circuit Local Rule §4(b).1 In fact, the record reveals that, after

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1. Local Rule §4(b) of the United States Court of Appeals for the Second Circuit reads in relevant part that "... any counsel wishing to be relieved on appeal shall ... advise the defendant that the defendant must promptly obtain other counsel ... and that if the defendant is financially unable to obtain counsel, a lawyer may be appointed by this court under the Criminal Justice Act...." Local Rule §4(b)©. Subdivision (d) of said Rule goes on to provide that "[a] motion to withdraw as counsel on appeal where the attorney is retained in a criminal case or appointed under the Criminal Justice Act must state the reasons for such relief and must be accompanied by one of the following: (1) A showing that new counsel has been retained or appointed to represent defendant; or (2) The defendant's completed application for appointment of counsel under the Criminal Justice Act or a showing that such application has already been filed in the Court of Appeals; or (3) An affidavit or signed statement from the defendant showing that the defendant has been advised that the defendant may retain new counsel or apply for appointment of counsel and expressly stating that the defendant does not wish to be represented by counsel but elects to appear pro se; or (4) An affidavit or signed statement from the defendant showing that the defendant has been advised of the defendant's right with regard to the appeal and expressly stating that the defendant elects to withdraw the defendant's appeal; or (5) A showing that exceptional circumstances prevent counsel from meeting any of the requirements stated in subdivisions (1) to (4) above. Such a motion must be accompanied by proof of service on the defendant and the Government and will be determined, without oral argument, by a single judge ...." At bar, the district court, without jurisdiction, relieved petitioner's retained counsel from the case and counsel failed to make an application to be relieved at the court of appeal. Furthermore, the court of appeals failed to discharge its own legal responsibility pursuant to Rule §4(b) (which left petitioner without counsel for eight and one-half months).

numerous written complaints filed, Barry Fallick, of Rochman, Platzer, Fallick, Sternheim, and Luca, LLP, was appointed as CJA attorney of record.

On September 20, 2007, oral argument of the appeal was before the Second Circuit. On September 25, 2007, appellant's conviction and sentence was affirmed (A.1)2 On October 1, 2007, petitioner had the occasion to speak with his attorney, Mrs. Harrington, who argued the cause based on the demise of Mr. Fallick. Having been informed of the court's decision, petitioner asked counsel to assist him in filing an application for a rehearing. However, rather than following petitioner's instructions, counsel sought permission to withdraw as counsel of record on appeal.

On October 1, 2007, petitioner objected by way of telephonic communication to the Case Manager of the United States Court of Appeals, and filed moving papers, regarding counsel's application to be relieved. On October 25, 2007, the court granted counsel's motion to withdraw, and permitted petitioner to file a petition for rehearing on or before December 3, 2007, but without the benefit of counsel.

On November 14, 2007, petitioner moved for an extension of time, and requested that the court

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Only when the appellate court contacted counsel was an application submitted to be relieved and appointed counsel assigned. In any event, the order of the district court relieving retained counsel of record was, in effect, nugatory and not authorized by law..

2. "A" hereinafter refers to the joint appendix.

appoint another attorney for him. By order dated December 11, 2007, the court denied appellant's application. On December 21, 2007, petitioner, again, motioned the court seeking for the same relief requested in his November 14, 2007, moving papers, which was denied by the court on December 27, 2007.

On January 22, 2008, petitioner submitted a motion to recall the mandate which was denied of February 13, 2008. Petitioner then filed a motion for reargument on February 27, 2008. By order dated July 3, 2008, petitioner's application was denied (A.2).

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision has departed from the norms that animate our system of American Jurisprudence which guarantee the right to due process of law, a fair trial, and the assistance of counsel on appeal.

First, a novel question of law is presented which ought to be reviewed by this Court regarding a trial judge's continuous interjections and questioning of the Government witnesses which egregiously abrogates a defendant's right to a fair trial. It is the government's job to prove the case.

Second, an important question of law exists as to whether petitioner was effectively denied his right to counsel as protected by the Equal Protection and Due Process Clauses to the United States

Constitution when the appellate court refused to appoint him an attorney for the purpose to perfect a F.R.A.P. Rule 40 application, and when appointed counsel sought, and was permitted to withdraw, despite petitioner's request for the assistance of counsel to file the aforestated application.

1. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL, AND DUE PROCESS OF LAW, WHEN THE COURT EXCEEDED THE PERMISSIBLE BOUNDS OF INQUIRY IN THE QUESTIONING OF WITNESSES AND PRESENTATION OF EVIDENCE.

Petitioner respectfully submits that a writ of certiorari should issue to resolve the question as to when a Judge violates a defendant's right to a fair trial and due process of law based on the constant questioning of the government witnesses during the presentation of evidence and during cross examination during a criminal trial. Due process requires that a trial proceed before a Judge with no actual bias against the defendant or an interest in the outcome of the particular case. United States v. Wessels, 539 F.3d 913 (8th Cir. 2008).

At bar, the record is inundated with an admixture of references that clearly illustrates the trial court's repeated questioning of the government witnesses and interjection into the proceedings.

During this Judge trial, the court practically conducted its own inquiry into the facts which he was ultimately supposed to determine; not from his own

inquiry, but from the evidence presented by the Government. Irrespective of whether a criminal defendant elects a trial by judge or a jury of his peers, the Government is required to prove his guilt beyond a reasonable doubt. The trial judge cannot do the job of the Government by proving or disproving the case to himself. At bar, this is exactly what occurred. Astonishingly, the record reflects that the trial judge asked over six hundred fifty (650) questions of the various Government witnesses within a three (3) day trial. By doing so, the Judge acted as an advocate for the prosecution and treated the petitioner in a manner inconsistent with the rudimentary demands of criminal procedure and impartiality. By asking such an inordinate amount of questions, the Judge effectively relieved the Government of its burden of proving each and every element of the crime charged and the defendant's commission thereof. See, e.g., In re Windship, 397 U.S. 358, 364 (1970) ("we hold that the Due Process Clause protects the accused against conviction except proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

It was the government's responsibility to develop sufficient facts for the court to convict, not the court's responsibility. In his appellate brief, petitioner claimed that the district court actions of proving or disproving the counts to himself constituted structural error. The appellate court did not address the issue.

The pervasive conduct of the judge, his continuos questioning of the witnesses,(irrespective

of whom the questioning favored) and the constant interruptions resulted in prejudice to Mr. Castellar which should have resulted in a new trial. See, e.g., United States v. Mazzilli, 848 F.2d 384 (2nd Cir. 1988); United States v. Victoria, 837 F.2d 50 (2nd Cir. 1988); see also United States v. Van Dyke, 14 F.3d 1090 (8th Cir. 1994); United States v. Beaty, 772 F.2d 1090 (3rd Cir. 1983); United States v. King, 650 F.2d 534 (4th Cir. 1981); United States v. Hickman, 592 F.2d 931 (6th Cir. 1979); United States v. Long, 565 F.2d 1162 (5th Cir. 1971).

Because it is axiomatic that all criminal trials must be conducted within the bounds of fundamental fairness (Taylor v. Haines, 418 U.S. 488 (1974), as the atmosphere essential to the preservation of a fair trial must be maintained at all costs, a writ of certiorari should issue to resolve this claim.

2) PETITIONER WAS DENIED EQUAL PROTECTION AND DUE PROCESS OF LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION WHEN THE APPELLATE COURT PERMITTED APPOINTED COUNSEL TO WITHDRAW,OVER THE OBJECTION OF PETITIONER, AND FAILED TO RE-APPOINT ANOTHER ATTORNEY FOR THE PURPOSE TO FILE A F.R.AP. RULE 40 APPLICATION FOR REHEARING.

Petitioner respectfully submits that another important and novel question of law ought to be reviewed with respect to whether (1) counsel's failure to assist the petitioner file a Rule 40 application as

requested by the client constitutes ineffectiveness per se, and (2) that the circuit court's failure to make an effective appointment of counsel constituted a violation of the Equal Protection and Due Process Clause to the United States Constitution.

The court granted petitioner an extension of time to file a petition for a rehearing. Because petitioner did not possess the necessary expertise to perfect such application, and because the court refused to appoint a new attorney for that purpose Rule §40 in this case became nugatory and meaningless.

It is clear that an essential ingredient in our system of American Jurisprudence, rooted deeply in the adversarial context, is the right to the assistance of counsel in a criminal prosecution. The right to the assistance of counsel was first recognized by this court in Powell v. Alabama, 287 U.S. 45 (1932). In Glasser v. United States, 315 U.S. 60 (1942), the doctrine was further developed, which provided that "in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense ...." (U.S. Const. Amend. VI). The right to be represented by counsel, on direct appeal from a conviction as well as the criminal trial, "is among the most fundamental of rights." Penson v. Ohio, 488 U.S. 75, 84-85 (1988). Due process guarantees a criminal defendant the right to counsel on his first appeal as of right, see Douglass v. California, 372 U.S. 353, 356 (1963), and the effective assistance of counsel on such appeal. Evitts v. Lucey, 469 U.S. 387, 396 (1985).

Of course, the Sixth Amendment does not include any right to appeal. See, Martinez v. Court of Appeal, 528 U.S. 152, 160 (2000) ("as we have recognized, the right to appeal ... is purely a creation of statute"). This court has made clear that any right to counsel in an appeal must be grounded in the Equal Protection and Due Process Clauses. Id. at 161. E.g., United States v. Gillis, 773 F.2d 549, 559 (4th Cir. 1985) (no constitutional right to appeal, but once appeal granted, "the Equal Protection and Due Process Clauses command that an indigent defendant has a right to appointed counsel"); United States v. Pajooh, 143 F.3d 203, 204 (5th Cir. 1998) ("[b]ecause Congress has created the statutory mechanism by which to appeal a criminal judgment of conviction, due process entitles him to 'meaningful appellate review'"); Tamalini v. United States, 249 F.3d 895, 901 n.3 (9th Cir. 2001) ("[c]oncluding that the 6th Amendment is inapplicable to appeals does not leave the criminal appellant constitutionally defenseless ... if the State provides an appeal as a matter of right, its appellate procedures must comport with the Due Process and Equal Protection Clauses of the 14th Amendment"). With respect to the right to counsel on appeal, this court has determined that a petitioner does not have a right to counsel in connection with the filing of a certiorari petition. See, Wainright v. Torna, 455 U.S. 586, 587 (1982).

At bar, petitioner was left constitutionally defenseless for the initial eight and one-half months after filing a notice of appeal, and subsequently thereafter when his conviction and sentence was

affirmed. Petitioner asked his attorney to assist him in preparing a petition for a rehearing. Rather than doing so, counsel moved, and over the objection of petitioner, to be relieved as counsel of record. The appellate court granted the application. The appeals court then permitted an extension of time for petitioner to file said application pro-se. The appellate court denied petitioner's various requests for reassignment of appellate counsel. Consequently, because petitioner did not possess the necessary legal skill to prepare said application, he was denied the right to counsel which such situations, as here, are sought to protect.

It is clear that Congress enacted Rule §40 of the Federal Rules of Appellate Procedure as part of the appeal process to argue facts which were either overlooked by the court, or to seek en banc review to resolve what is often called a "circuit split" regarding the issue presented. Fed. R. App. P. §40 sets forth in relevant part that:

Rule 40. Petition for Penal Hearing

(A) Time to File, Contents, Answer, Action by the Court if Granted.

(1) Time: Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of the judgment ...

(2) Contents. The petition must state with particularity each point of law or fact that the

petitioner believes the court has overlooked or misapprehended and must argue in support of the petition ...."

Since such procedural vehicle is available to an appellant, See, Fed. R. App. P §40(a)(1)(2). then it logically flows that he is entitled to the assistance of counsel to such an application. Accordingly, not only was counsel negligent in the premises by failing to assist his client but also, parenthetically, the circuit court's failure to make an effective appointment of counsel for the purpose of filing a petition for a rehearing resulted in the complete denial of counsel in violation of the Sixth Amendment.

CONCLUSION

BASED UPON THE AFOREMENTIONED STANDARDS OF THE ABOVE REFERENCED AUTHORITIES, A WRIT OF CERTIORARI SHOULD ISSUE.

Dated: Flushing, N.Y.
January 19, 2009

Respectfully submitted,

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APPENDIX I

Second Circuit decision affirming conviction

05-2793-cr(L)
USA v. Castellar

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 25th day of September, two thousand and seven

PRESENT:
HON. ROGER J. MINER
HON. JOSÉ A. CABRANES,
Circuit Judges
HON. PAUL A. CROTTY,*
District Judge

- -x

UNITED STATES OF AMERICA,
Appellee,

v.
No. 05-2793-cr

MARCO FIDEL CASTELLAR,
Defendant-Appellant.

- -x

APPEARING FOR APPELLANT, JILLIAN HARRINGTON (Barry M Fallick, *on the brief*, Rochman Platzer Sterheim Luca & Pearl, LLP, New York, NY

APPEARING FOR APPELLEE PETER B. SOBOL, Assistant United States Attorney (Michael J. Garcia, United States Attorney, Katherine Polk Failla, Assistant United States Attorney, *on the brief*), United States Attorney's Office for the Southern District of New York, New York, NY.

Appeal from judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Defendant-appellant Marco Fidel Castellar appeals from (1) a judgment of conviction in the District Court of making false claims to the Internal Revenue Service in violation of 18U.S.C. § 287 and obstruction of justice in violation of 18 U.S.C. § 1512(c)(1); and (2) an order of the District Court dismissing his motion to reduce his sentence pursuant to Federal Rule of Criminal Procedure 35. Following a bench trial, defendant-appellant was sentenced principally to a term of fifty-one months' imprisonment and ordered to pay restitution in the amount of $10,514. On appeal, defendant-appellant argues that he was denied a fair trial as a result of the District Court's repeated "interference with the questioning of the witnesses and the presentation of the evidence" during the bench trial and that the District Court erred in finding that the intended loss attributable to the offense was $200,000. We assume the parties' familiarity with the facts and procedural history of the case.

Where there is no objection by the defendant at trial, we review the District Court's allegedly improper questioning of witnesses under the plain error standard. *United States v. Filani*, 74 F.3d 378, 383 (2d Cir. 1996). Because counsel failed to object at trial, we also review defendant-appellant's claims regarding the admissibility of evidence for plain error. *United States v. Bruno*, 383 F.3d 65, 78 (2d Cir. 2004). We review the District Court's finding of the amount of intended loss for clear error and review its interpretation of the relevant Guidelines provisions *de novo*. *United States v. Ortiz*, 136 F.3d 882, 883 (2d Cir. 1997).

Defendant-appellant's arguments with respect to the District Court's questioning of witnesses and the admission of certain evidence are without merit. We conclude that the District Court did not err in its determination of the loss attributable to the offense. We also conclude that the sentence imposed is not unreasonable.

The judgment of the District Court is AFFIRMED

FOR THE COURT
Catherine O'Hagan Wolfe, Clerk of Court
By _____

APPENDIX II

Second Circuit Decision Denying Motion to Recall Mandate.

Second Circuit Court of Appeals
05-2793-cr(L)

Motion for: Reconsideration to recall mandate

UNITED STATES OF AMERICA

V.

MARCO F. CASTELLAR

Before: Hon. Roger J. Miner, Hon. Jose A. Cabrenes, *Circuit Judges,* Hon. Paul A. Crotty, *District Judge*

IT IS HEREBY ORDRED that Appellant's motion for reconsideration of the Courts February 13,2008 order denying the motion to recall the mandate is DENIED.

FOR THE COURT
Catherine O'Hagan Wolfe, Clerk
By

Joy Fallek, Administrative Attorney

Jul 3, 2008
Date